FARM CREDIT ADMINISTRATION
Washington, D. C.

SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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COOPERATIVE RESEARCH AND SERVICE DIVISION

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Table of Contents

STOCK REPURCHASE AGREEMENT OF COOPERATIVE UPHELD

In Learmouth v. Caledonia County Co-Op. Ass'n, Inc. 109 Vt. 526, 1 A. 2d, 732, a milk producer brought an action against a cooperative creamery to recover the sum paid for a share of the defendant's capital stock allegedly purchased on the defendant's promise to buy it back if the producer became dissatisfied.

The bylaws of the association provided:

> "Any stockholder who desires to dispose of his share or shares of common stock shall first offer to sell the same to the Association at par value by writing to that effect to the Board of Directors, and said Board of Directors shall have an option for thirty days after receipt of such offer to buy such shares for the Association."

In addition, there was printed upon the stock certificates language to the effect that the acceptance of the certificate constituted a contract between the stockholder and the corporation and an agreement by the stockholder to accept and abide by the bylaws and not to sell his stock until after he had first offered it to the corporation.

The producer had been a former patron of the association who had become dissatisfied and had had his previous stock purchase refunded. Subsequently, the president of the association told him that if he would acquire a new share of stock, that later on, if he became dissatisfied, the directors would refund his money in 30 days, as they had done on the previous occasion. The producer agreed to deliver his milk under these circumstances, executed a note for the purchase price of one share of stock, and authorized the association to make deductions from his milk checks for the payment of the stock as had been done before.

After having paid for the share of stock in this manner, the producer again became dissatisfied with the services of the association and stopped delivering his milk to it, and asked the manager to have the purchase price of his share of stock refunded. Later, the producer sent a letter to the association, offering his share of stock for sale within 30 days, and stating that payment in full was expected or notice of a hearing that he might present a just cause for exchange of the stock for cash. As the producer was unable to obtain satisfaction from the association, he brought suit to recover the purchase price of his share of stock, based on the oral promise of the president, on behalf of the association, to buy back the stock if he was dissatisfied. In the lower court, verdict and judgment were for the producer, and the association

brought exceptions to the denial of its motion for a directed verdict on the ground that the contract was void because not in writing; that the contract was ultra vires; and that the president was not authorized to make the contract.

The Supreme Court of Vermont held that it was unnecessary for the contract to be in writing, since the oral promises were all a part of the sale of the stock.

> "Where one is induced to buy stock by a promise of the seller that he will take it back and repay for it on request, the contract is not within the statute of frauds. P. L. §1676. The promise and undertaking of the seller is not an independent original contract, but rather a part of the original contract of purchase, by which the purchase becomes a qualified and not absolute one, and is so material that the contract would not have been made without it. The price is paid as well for the seller's promise as for the stock. Fay v. Wheeler, 44 Vt. 292."

With regard to the contention that the contract was ultra vires because of a statute prohibiting a corporation from buying its own stock, the court said that this statute would have no application to the situation as the contract of the association to repurchase the stock made to induce the original sale was inseparable from the contract of sale. Special note was made of the fact that no question was raised as to the rights of creditors and that the conclusion was reached upon the basis that creditors were not involved.

With regard to the point that the president was not authorized to enter into a contract of this character, the court stated:

> "Achilles had no express authority from the directors to make this trade with the plaintiff, but at that time the directors were all buying milk, and whenever they could interest a producer to bring his milk to the creamery they did so. Achilles had talked with the directors several times at their meetings about making refunds, and it was understood by all that 'reimbursing for shares of stock was the best principle for running the business,' and the fair inference from all his testimony is that the other directors made similar trades, although neither they nor Achilles talked over any particular trade together. It was through Achilles that the plaintiff had purchased his first share and had it redeemed. In view of the provision in the bylaws relative to buying back stock we see no reason why it does not enable the directors to adopt a policy of redeeming all stock and to contract with a prospective purchaser

of stock to take his stock back if he becomes dissatisfied. The jury were justified in finding that Achilles was authorized to make this contract."

After disposing of several other minor contentions of the association with regard to the evidence and procedure, the Supreme Court affirmed the judgment of the lower court.

For other cases presenting somewhat similar situations, and in which bylaws providing for the repurchase of stock were upheld, see: Loch v. Paola Farmers' Union Co-Op. Creamery & Store Ass'n. 130 Kans. 136; 285 P. 523; 287 P. 269, and Whitney v. Farmers' Co-Op. Grain Co. 110 Neb. 157; 193 N.W. 103.

ALLOWANCES AND DISCOUNTS IN LIEU OF BROKERAGE HELD VIOLATIVE OF ROBINSON-PATMAN ACT

C O P Y

For IMMEDIATE RELEASE

FEDERAL TRADE COMMISSION
Washington

Tuesday, September 26, 1939.

The Federal Trade Commission announces unanimous affirmance by the United States Circuit Court of Appeals for the Third Circuit of its order to cease and desist requiring The Great Atlantic & Pacific Tea Company to discontinue violation of Section 2 (c), the brokerage paragraph, of the Robinson-Patman Act.

The Court, speaking through Judge Biggs, directs enforcement of the Commission's order, which prohibited The Great Atlantic & Pacific Tea Company from accepting allowances and discounts in lieu of brokerage on its purchases of commodities in interstate commerce. The Court's opinion, in which it approved similar decisions of the Second and Fourth United States Circuit Courts of Appeals in the Biddle and Oliver cases, is a clear-cut ruling on the most important questions which have arisen in connection with the interpretation and application of the brokerage paragraph of the Robinson-Patman Act.

The Court held that the services rendered clause of the brokerage paragraph did not set up a condition upon which brokerage could be paid or allowed to a buyer on his own purchases, that that paragraph absolutely prohibited the payment of such brokerage; that Paragraph (c) was entirely independent of Paragraph (a),

the general price discrimination paragraph of the Act, and the provisions of the latter could not be read into the former; that Paragraph (c), as construed and applied by the Commission, was not violative of the Constitution.

The Commission's order prohibited The Great Atlantic & Pacific Tea Company from purchasing commodities at so-called net prices which involved a price concession in lieu of brokerage, from accepting so-called quantity discounts, or other types of discounts, granted in lieu of brokerage, and from accepting discounts and payments of all kinds representing, in whole or in part, brokerage on its own purchases.

The Great Atlantic & Pacific Tea Company contended that the facts in the case showed that its buying agents had rendered services to sellers which justified the company's receipt of the net price concessions and payments in question, and that there was no evidence to indicate that its receipt of such concessions and payments had injured competition. The Commission, however, held that the payment of brokerage to buyers on their own purchases was absolutely prohibited by the Robinson-Patman Act and, moreover, found as a fact that the services of the Tea Company's agents were not rendered to sellers but were rendered to the Tea Company itself, and the benefits to sellers therefrom were purely incidental. The Commission further found as a fact that the Tea Company's receipt of allowances and discounts in lieu of brokerage did injure competition, but stated that an injury to competition was not necessary to be shown in proceedings under the brokerage paragraph. The Court sustained the Commission in this view, holding that the evidence in no wise supported the Tea Company's contention "that the net prices, allowances, discounts, escrow sums or abeyance accounts received by or made available to the Tea Company by the sellers were made available or paid to the Tea Company because of the alleged services rendered by its field buying agents to sellers. The great weight of the evidence indicates the contrary. The net prices, discounts and allowances received by the A. & P., the setting up of abeyance accounts and escrow sums for its benefit are nothing more than devices put into effect by the A. & P. in attempted avoidance of the prohibitions of the Robinson-Patman Act."

The Court said further with respect to the Commission's findings as to the facts that " * * * we have carefully examined the findings of the Commission and the record. Not only are the findings of fact made by the Commission supported by the evidence, but we state as our opinion that the Commission properly could have reached no other conclusions than those expressed."

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On the law the Court held:

1. "Subsection (c) contains an absolute prohibition of payments or allowances of brokerage or sums in lieu of brokerage from sellers to buyers."

2. "Paragraphs (a) and (c) possess separate significance and are independent of each other."

3. That Paragraph (c) as construed and applied by the Commission is constitutional.

In connection with its first point under the law, the Court said: "At each stage of its enactment, paragraph (c) was declared to be an absolute prohibition of the payment of brokerage to buyers or buyers' representatives or agents. Such is the plain intent of the Congress and thus we construe the statute. Any other result would frustrate the intent of Congress."

The Court further said: "The question presented for our consideration is simply whether or not the vendee may be compensated for services rendered by the vendee's agent acting as agent for the vendors. It is obvious that dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller."

The Court added: "The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. * * * In short, a buying and selling service cannot be combined in one person." With respect to the second point under the law, in holding that Paragraphs (a) and (c) were separate and distinct, and that the injury to competition and cost differentials provisions of the former could not be read into the latter, the Court said: "Paragraph (c) * * * deals with one particular subject, viz., allowances and discounts in lieu of brokerage * * *. In other words, paragraph (c) constitutes a specific prohibition of a specific act and the acts committed by the Tea Company are within such prohibition."

The Court held that if brokerage savings could be passed on to buyers on their own purchases as differentials in cost under the provisions of Paragraph (a) of the Act, Paragraph (c) would have little force or effect, saying "To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent."

In holding Paragraph (c) to be constitutional as thus construed and applied, the Court stated that "Congress is not required to limit the exercise of its power under the Commerce Clause upon the effect of forbidden acts in particular instances. It may proceed generally for the protection of commerce in general, expressing its disfavor of certain acts as hurtful to competition in such terms as it sees fit so long as it does not transgress the boundaries imposed by the Constitution. * * *" "The practice of paying brokerage, or sums in lieu of brokerage, to buyers or their agents by sellers was found by Congress to be an unfair trade practice resulting in damage to commerce. Paragraph (c) prohibits such practice. We conclude that Congress has properly exercised its power to the end that the main abuse may be done away with."

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ASSOCIATION DENIED RECOVERY ON INSURANCE POLICY

In Millers' Mutual Fire Insurance Association of Illinois v. Warroad Potato Growers Association, 94 F 2d 741, it appeared the association had taken out a policy of fire insurance covering "stock consisting of potatoes and all other merchandise and supplies not otherwise insured and not more hazardous, handled or used by the insured in their business, their own or held by them in trust or on storage, if in case of loss the insured is legally liable therefor."

Subsequently, a fire occurred which damaged sacks owned by the association of a value of $45.00, and a quantity of potatoes which were in storage for the members of the association. The insurance company denied liability for the loss to the potatoes, and the association brought an action at law against them on the policy, which resulted in a verdict in favor of the association.

Upon appeal, the court held since the association did not claim to own the potatoes or to be in any way liable to the owners for their loss that, under the terms of the policy, it was not entitled to recover. In this connection, the court said:

> "The policy in suit, by its terms, insured potatoes handled or used by the insured, its own or held by it in trust or on storage, 'if in case of loss the insured is legally liable therefor.' If the quoted words were omitted, the policy would undoubtedly have covered all potatoes in storage contained in the warehouse, although not owned by the insured and although it was not legally liable for their loss. California Insurance Co. v. Union Compress Co., 133 U.S. 387, 10 S. Ct. 365, 33 L. Ed. 730;

Home Insurance Co. v. Baltimore Warehouse Co., 93 U.S. 527, 23 L. Ed. 868. The presence of these words, however, negatives any intention on the part of the insurers to cover potatoes in storage for the loss of which the insured was not legally liable. It is plain, therefore, that this policy did not insure potatoes in storage, but covered only the liability of the insured to the owners in case of loss by fire."

The court held further that the rule that an ambiguous policy is to be construed most favorably to the insured had no application to the case before it, since the language of the policy was so clear and certain that there was no room for judicial construction.

The association also urged that the conduct of the insurance company after the loss indicated it regarded the policy as covering all the potatoes in storage, regardless of legal liability, and that the practical construction which the company had placed on the policy should be adopted by the court. The court, however, held it is only where there is doubt as to the meaning of the terms used or where the contract is silent or incomplete that a court will resort to the practical construction which parties have placed on a contract as a basis for its construction.

The insurance company asked the court to reverse the judgment appealed from and direct the lower court to render judgment in its favor, but this the court refused to do on the ground that in a law case, the court is merely a reviewing court and cannot retry the case and direct the entry of judgment which it thinks should be entered. Accordingly, judgment was reversed and the case remanded to the lower court for further proceedings not inconsistent with the opinion.

Following this case, the insurance company, in Millers' Mutual Fire Insurance Association of Illinois et al. v. Bell, Judge, 99 F. 2d, 289, brought proceedings for writ of mandamus against the United States District Judge for the District of Minnesota to require him to enter judgment in favor of the insurance company. However, the petition was denied on the grounds stated in the principal case, namely, that on appeal in a law action, the reviewing court acts only as a court of error, and is without power to direct a lower court to enter judgment required by the evidence adduced at the trial.

This case illustrates the necessity of cooperative associations' obtaining insurance coverage which is so worded as properly to protect its own property, and that of its members, which may be stored with it if the association desires to furnish such protection.

ENJOINING THIRD PARTY FROM INTERFERING WITH MARKETING AGREEMENT

In Local Dairymen's Cooperative Association, Inc. v. Potvin 54 R. I. 430, 173 A. 535, the Supreme Court of Rhode Island affirmed the final decree entered in the lower court enjoining the defendant trucking company from delivering milk of members of the association residing in Connecticut "except to dealers or places designated by complainant." No members of the association were parties to the action.

It appears that when the association was organized in 1931, the trucking company was engaged in trucking milk from producers in Connecticut to dealers in Providence, Rhode Island, and knew that the producers had entered into marketing agreements with the association whereby it was appointed sales agent for its members, and had the power to designate the dealers to whom milk should be delivered. For nearly a year, the company complied with the orders of the association, designating the place of delivery of the milk, but in September, 1932, it disregarded the designations of the association and delivered the milk to other dealers in Rhode Island, in accordance with the instructions of members.

The trucking company argued that it should not be enjoined from carrying the milk of the complainant's members who had broken their marketing agreements, because it had not induced the members to breach the agreements. In answer to the argument, the court stated:

> "* * *The intent of the agreements was that the milk was to be sold in this state through complainant. Complainant would have serious difficulty in enforcing the performance of its agreements with any of its members residing in Connecticut. To pursue the individual members for breaking their agreements would create a multiplicity of suits, and the remedy by damages would be inadequate. Furthermore, complainant would sustain irreparable injury if its agreements with its members were not performed by them. Respondents knew of these agreements and should not be permitted to profit by their breach. The most effective way of preventing a breach of the agreements is to enjoin a third party from delivering the milk of such members to anybody in this state, except to the person entitled to receive it under the agreements. The interest of such members in being able to sell their milk in this state may cause them to keep their agreements. In such circumstances, the remedy by injunction is both practical and efficient." (Underscoring added.)

The trucking company also argued that the marketing agreements were void "because they were not made to terminate within ten years as provided in the statute." The court, however, held that "the claim that the agreements are ultra vires can be raised only by the state or by some member of the complainant association." For earlier cases consistent with the holding in this case, see: Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N. W. 936; Dairy Co-operative Ass'n v. Brandes Creamery, 147 Ore. 488, 30 P. 2d 338, 147 Ore. 503, 30 P. 2d 344.

A different view was taken by the Supreme Court of Tennessee in Knoxville Milk Producers Association v. Blake, et al., 171 Tenn. 283, 102 S. W. 2d 64. In this case, the association appealed from an order of the chancellor dissolving an interlocutory injunction obtained by it and from an order dismissing the bill upon such dissolution. The association had charged that certain of its members who were not made parties to the suit and who had entered into written marketing agreements with the association were induced by the defendants who operated the Levonia Dairy to breach their membership contracts with the association and to sell their milk to the defendants, and it was further charged that the defendants were threatening to induce other members to violate their contracts with the association.

It was the contention of the association that unless it could prevent such breaches of its membership contract, its business would suffer irretrievable loss and that complete justice could only be given through injunctive remedies generally accorded cooperative marketing associations. The bill prayed that the defendants be enjoined from "inducing, persuading, enticing or encouraging any member of the complainant association to breach the membership contract, and that defendants be enjoined from buying any milk from cows" owned or controlled by the two members in question.

The Supreme Court affirmed the decree of the chancellor, dismissing the bill and dissolving the interlocutory injunction on the ground that ordinarily one who induces the breach of a contract is guilty of a tort and the remedy is an action in damages; and on the further ground that in the absence of an allegation that defendants were insolvent or that they had acted willfully or maliciously the association was not entitled to an injunction to restrain the purchase of milk from its members by nonmembers where the members were not made party defendants. The following quotations are taken from the opinion in this case:

> "Ordinarily, one who induces the breach of a contract is guilty of a tort, and the remedy is an action in damages. Varno v. Tindall, 164 Tenn. 642, 51 S. W. (2d) 502. But it is insisted, for complainant, that, by reason of the peculiar and unusual nature of

co-operative marketing contracts, and of the rights of a co-operative marketing corporation formed under our act, the complainant has the right to the injunctive relief sought, even against nonmembers of the association, and without the necessity of action against the members, and it is insisted that it is not necessary that the insolvency of the parties guilty of inducing the breach of the members' contract should be alleged or made to appear, particularly in view of the allegations of the bill. And we are referred to a number of cases, which it is said sustain this view."

* * * * * *

"It is to be observed that in practically all of the cases dealing with the question, where it is sought to reach and enjoin a nonmember of a Co-Operative Marketing Association, from interfering with a contract between an association and a member, that the member himself has been joined in the action with the third party. In the case before us, as already stated, the members of the complainant association are not made parties. The bill contains no allegation of the insolvency of the defendants, nor a charge that they acted willfully or maliciously in inducing the alleged breach of the members. But the bill does charge that the members, within the meaning of their contracts, control the milk produced from the cows owned by them upon the date of their contracts.

"And while our act provides that a breach or threatened breach of a marketing contract with a co-operative marketing association may be enjoined, and that the association may have a decree of specific performance, yet the language of the act confines such remedy to the member himself and does not extend the injunctive relief to third parties. Code, §3817. And necessarily specific performance could be had against a member only; and it seems that the statutory injunctive relief is intended to be pursued concurrently with the remedy of specific performance against the member."

It should be observed that in the two cases just considered, the associations were attempting to obtain injunctions against third parties for interfering with their contractual relations with their own members. These cases are unlike the case of the Tulsa Creamery Company v. Tulsa Milk Producers Cooperative Association, Inc., 175 Okla. 51, 51 P. 2d 950, in which the court refused to enjoin the creamery company from purchasing milk elsewhere, where

the creamery company had entered into a contract with the milk association to buy milk and cream exclusively from the association, which subsequently had refused to deliver further milk to the creamery because payments had not been made in accordance with the contract and because the creamery had failed to comply with the demand of the association made under an option provided by the contract that security be given for the account. In this case, the court felt that an injunction would not lead to the enforcement of the contract, but would probably ruin the business of the creamery company without conferring any substantial benefits on the association; and the hardships arising from the injunction would be out of proportion to any possible benefits that might accrue. In this connection, the court said in part:

> "The granting of the injunctive relief here sought would not result in the carrying out of the primary plan of the contract, that is, the sale of milk by the plaintiff and the purchase of the needed supply by defendant, for the record shows that the defendant, through inability, failed to furnish the 'acceptable security' without which the plaintiff would not furnish defendant any milk.
>
> "The closing of defendant's business by injunction would benefit plaintiff but little, if any at all. If it be true that the closing of defendant's business by injunction would benefit plaintiff in that it would destroy that much of the outlet of those producing milk in competition with plaintiff, that benefit would be quite small as compared to the injury to defendant in the destruction of their business enterprise."
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> "Since the plaintiff elected to cease furnishing milk to the defendant, necessary to operate its plant and business, it would hardly be just and equitable under the facts here shown to prevent the defendant from obtaining elsewhere its needed milk supply. Since the direct result of the granting of the injunctive relief here sought would be the closing of the defendant's plant and the destruction of its business, such action by this court would work an unjustified hardship, and would equal or too closely approach oppression by injunction."

The cases previously considered present facts which differ substantially from those which were before the court in the case of Miami Home Milk Producers Association v. LaCourse, 117 Fla. 348, 158 S. 116. In this case, the court refused to enjoin a member

of the association who had entered into a contract to deliver all the dairy products which she produced to the association from delivering her dairy products to others in violation of the contract. In this case, the trial court made a special finding that:

> "* * *the price of milk allowed and paid by plaintiff to the defendant is below the cost of production as shown by the testimony and that defendant was justified under the circumstances in withdrawing from the plaintiff association, to avoid irreparable loss and injury, and virtual confiscation of her property."

and the appellate court, in view of this finding, affirmed the decision below. The court, however, specifically stated that its affirmance of the decree of the lower court denying an injunction would leave the parties to an appropriate action at law if their legal rights had been violated, and apparently felt that an action for damages might be maintained.

The effect of this decision would seem substantially to impair the right to injunction and specific performance of contracts in situations where market conditions were such that the prevailing market prices were less than the current costs of production, a situation which has occurred on a number of occasions in recent years. In addition, insofar as the sale of milk is concerned, it is not uncommon that an individual producer, by finding some dealer who is willing to pay him the fluid price for all or nearly all of his milk may, in that way, be able to obtain a better return for his milk than the association, which is compelled to market surplus as well as fluid milk, is able to pay him.

MAY A COOPERATIVE ASSOCIATION COMMIT A TORT TO FURTHER ITS LEGITIMATE BUSINESS PURPOSES?

In Hy-Grade Dairies v. Falls City Milk Producers Ass'n et al., 261 Ky. 25, 86 S. W. 2d, 1046, it appeared that an individual was doing business in the name of Hy-Grade Dairies, and brought an action against the association and others for damages to his business, and sought an injunction against them to prevent alleged interference with the conduct of his business. He alleged that the association had conspired with others to illegally fix the price of milk paid to producers and the prices to be paid by distributors, by requiring distributors to collect from producers a fixed sum and to pay the same over to the association. He also alleged that the association had conspired to and bought up milk routes and used strong-arm methods to require distributors and producers to ally themselves with it; that the association had stopped trucks hauling milk to him and diverted milk consigned to him by nonmembers. The charges also included picketing and spreading false reports about his financial standing.

It appears that he had formerly purchased milk from the association, but had refused to pay certain sums in accordance with his contract whereby he was required to pay to the association amounts fixed by the so-called equalizing contract.

The association pleaded affirmatively, charging that the plaintiff had, on numerous occasions, induced and attempted to induce members to violate their marketing contracts with the association by delivering their milk to him instead of the association. The association alleged that their operations were in strict conformity with the Cooperative Marketing Act, and sought to recover statutory damages from the plaintiff for inducing the members of the association to breach their marketing agreements.

In the lower court, a preliminary injunction had been granted, and following a hearing of the case upon its merits, the court adjudged that the preliminary injunction be dissolved; and that the plaintiff's application for permanent injunction be denied. The court also awarded the plaintiff $500 in damages from the association and named members, and the association was awarded a recovery from the plaintiff of $734.20, covering the indebtedness previously alluded to. From this judgment, the plaintiff appealed, and the association filed a cross appeal.

In reviewing the case, the court of appeals stated that most of the evidence related to activities of the association and its members which were clearly within the provisions of the Cooperative Marketing Act, and then added:

> "As to facts, beyond those above mentioned, bearing on matters clearly within the scope of the Association's powers, it may be said that those which are outside the pale of the law's authorization consisted of overt acts of the Association members in taking milk from the trucks of the plaintiff on October 5, and perhaps another date. It so happened that along with the milk, which admittedly should have been delivered to the Association, was some milk of nonmembers which the plaintiff had the right to receive. The members very frankly admit the taking of all the milk, but disavowed knowledge that any of the milk taken was that of nonmembers. They quite as frankly admit 'picketing' the plant of plaintiff, but avow that it was only for the purpose of preventing its own members from violating their contracts by delivering Association milk to a nonmember. They admit that they had meetings at which the question of price fixing, price cutting, and the proper method of taking care of surplus milk were discussed -- sometimes rather heatedly.

> The plaintiff also admits that he, at the times mentioned, did procure membership milk, and in order to receive it, he sent his trucks into the country to pick it up from trucks on the highways. As to his claim that his business was injured by false reports of his financial standing, the most that can be said of such was that there was perhaps a threat that such would be done."

Insofar as the plaintiff's right to recovery from the association is concerned, the court stated:

> "The Association was free at any time to refuse to sell the milk of its members and free to refuse to let its members sell their milk to him direct."

The court added that admitting that the plaintiff was unable to obtain sufficient milk to meet his needs, it was nevertheless incumbent upon him to show that but for the wrongful acts of the association in diverting the nonmember milk, he would have procured sufficient milk to meet his needs and to do this, he must show that there was nonmember milk which he could have secured if the association had not prevented this by its improper acts; that insofar as the member milk was concerned, the association "properly could and did subtract the member milk from his supply."

The court concluded that it was clear that the major part of his milk shortage was caused by legitimate and proper conduct on the part of the association in refusing to let its member milk go to one who was openly hostile. The court expressed the view that while the association was liable to the plaintiff for wrongfully intercepting nonmember milk and that some damage had undoubtedly been caused in this manner, that in amount this would not exceed the $500 awarded by the lower court.

The statements of the court quoted hereafter with reference to an injunction against further interference with the plaintiff's business are particularly illuminating:

> "The portion of the prayer which asks an injunction against 'interfering with plaintiff's business' is, of course, limited and qualified by the enumeration of the various specific methods of interfering set out therein. He is asserting interferences which, if committed, would be wrongful, and he is correct in the assertion that such interferences are wrongful. A co-operative association cannot commit a tort even where its object in so doing is to attain the purpose for which it was legitimately formed, namely, the procurement of the highest possible price for the products of its members. It cannot be contended that a co-operative

> can by its activities close up or interfere with private business inimical to and standing in the way of accomplishment of its purposes and justify its acts by asserting that the end justifies the means and that a legitimate end legitimatizes acts which are inherently wrong. It seems obvious that co-operatives must attain their goal by economic pressure legitimately applied, and without resorting to practices and acts which, if committed by a less favored corporation or by private individuals, would not be countenanced by a court of equity."

The prayer for a permanent injunction was denied on the ground that the association had agreed not to interfere, in the future, with the delivery of nonmember milk to the plaintiff.

Insofar as the counterclaim of the association for statutory damages for inducing the breach of members' marketing contracts and for the balance of $734.20 alleged to be due under the dealer's contract, the court stated that since these did not arise out of the cause of action asserted by the plaintiff and were unconnected with it, they should not properly have been asserted in the action by way of counterclaim. However, since the plaintiff had not questioned the propriety of their inclusion in the action, both counterclaims were properly before the court. The court held that the balance of $734.20 under the dealer's contract had been proven and should be allowed, but that the association had not advanced sufficient proof to support the recovery of the statutory penalties, and dismissed that portion of the counterclaim. Accordingly, the judgment of the lower court was affirmed.

In State v. Standard Oil Company et al., 130 Tex. 313, 107 S.W. 2d 550, the issue before the court was the constitutionality of the anti-trust statute of the State of Texas, which the defendants contended was unconstitutional.

It was charged that the statute was unconstitutional for the reason that the Cooperative Marketing Statute of Texas exempted from the provisions of the anti-trust statute associations organized under the Cooperative Marketing Act and their marketing contracts with members. With regard thereto, a majority of the Supreme Court of the State of Texas expressed the following view:

> "The Co-operative Marketing Act is comprehensive in its terms. It authorizes the creation of associations to carry out certain purposes. We hold that a corporation created under this act may do the legitimate things for which it is created. We do not assume that they will make contracts or adopt methods of carrying on their business in clear violation of the anti-trust laws." (Underscoring added.)

* * * * * * *

"If it should be held, however, that the Co-operative Marketing Act was intended to give the corporations to be formed thereunder the power and authority to do any of the things denounced by our anti-trust laws, and should it further be held that the giving of such power and authority created an unreasonable and unconstitutional classification in favor of such corporations, such holdings would render the Co-operative Marketing Act, at least to that extent, unconstitutional; and if it should be held that the Co-operative Marketing Act, or any of its provisions, is unconstitutional, such holding would not in any way affect the anti-trust laws."

Thus it appears that the views expressed by the Supreme Court of Kentucky with regard to the conduct of a cooperative association find support in the language quoted above from the decision by the Supreme Court of the State of Texas.